Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PERRIN W. HURDLE

Petitioner,

versus

SEARS, ROEBUCK AND COMPANY

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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DOCUMENT

Opinion of the Fifth Circuit

Perrin W. Hurdle

vs.

Sears, Roebuck and Company

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 96-60321
Summary Calendar

PERRIN W. HURDLE

v.

SEARS, ROEBUCK AND COMPANY

PER CURIAM.

JONES, DeMOSS and PARKER, for the Court:

Appellant Perrin Hurdle appeals the summary judgment dismissal of his age-discrimination lawsuit. He argues that genuine issues of material fact exist which preclude summary judgment; that the district court violated his constitutional rights by holding that an otherwise invalid waiver could be ratified; and that, even if it had been ratified, the waiver he executed did not bar his age-discrimination claim. We have reviewed the record and the district court's opinion and conclude that summary judgment was properly awarded in favor of Appellee Sears, Roebuck and Company. Accordingly, we affirm for essentially the reasons given by the district court. See Blakeney v. Lomas Info. Sys., Inc., 65 F.3d 482, 484-85 (5th Cir. 1995), cert. denied, 116 S.Ct. 1042 (1996); Wamsley v. Champlin Refining & Chem., Inc., 11 F.3d 534, 539-40 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403 (1995).

Hurdle's constitutional arguments, raised for the first time on appeal, do not show error, plain or otherwise.

AFFIRMED.

A 4

DOCUMENT

Order of Dismissal by the U.S. District Court

Perrin W. Hurdle

vs.

Sears, Roebuck and Company

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

PERRIN W. HURDLE
V.
SEARS, ROEBUCK AND COMPANY

ORDER OF DISMISSAL

This matter having come before the Court on the motion of the Defendant, Sears, Roebuck and Company, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having granted said motion in a Memorandum Opinion of even date herewith; and there being no other claims asserted by the Plaintiff.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the above-styled cause and action should be, and the same is hereby, dismissed with prejudice.

SO ORDERED AND ADJUDGED, this the 11th day of April, 1996.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

DOCUMENT

Memorandum Opinion of U.S. District Court

Perrin W. Hurdle

vs.

Sears, Roebuck and Company

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

PERRIN W. HURDLE
V.
SEARS, ROEBUCK AND COMPANY

MEMORANDUM OPINION

Before the Court is the motion of the Defendant, Sears, Roebuck and Company ("Sears"), for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of said motion, Sears offers the executed release of the plaintiff, Perrin Hurdle ("Hurdle"), discharging Sears from any liability Sears may have arising out of Hurdle's employment termination. This motion necessarily involves certain requirements codified at Title 28 Section 626(f), commonly referred to as the Older Worker Benefit Protection Act ("OWPA"). Moreover, this Court has been called upon to interpret said release in light of general contract law as it applies to voidability and recision. Having reviewed the memoranda of counsel, the attached documentation, the applicable statutory and case law, and being otherwise fully advised in the premises,

this Court is of the opinion that said motion is well-taken and should be granted for the reasons set forth below.

FINDINGS OF FACT

The facts, case in a light most favorable to the plaintiff, establish that Hurdle was terminated from his position as Assistant Manager of the Facilities following company reorganization. On the afternoon of July 20, 1993, store manager Rick Wickboldt contacted Hurdle and asked Hurdle to come to the store. Upon retiring to Wickboldt's office, Wickboldt informed Hurdle that he was being laid off. Hurdle avers that Wickboldt told him that in order to obtain severance pay he must execute a waiver. Hurdle believed this step to be a mere formality. Moreover, Hurdle contends that Wickboldt expressly assured him that said release would not affect any rights Hurdle may have against Sears for age discrimination.

Hurdle testified in his deposition that he did not read the document but simply "scanned it." Hurdle admits that he may have read the words but qualifies said admission by arguing that he did not understand them at the time. Later in his deposition

testimony, Hurdle avers that he never was advised in writing or given the opportunity to seek legal counsel. Hurdle, does, however, testify that he was not coerced to sign the release. The entire meeting lasted no more than thirty minutes.

The release in question provided Hurdle forty-five days in which to consider signing the release. In addition, a seven day revocation period was afforded. Hurdle admits that he was aware of, and understood, these provisions when he signed the release. In fact, Hurdle argues that he attempted to rescind the release with the seven day period. While Hurdle acknowledges the presence of the forty-five day provision, he argues that he was afforded no more than thirty minutes despite that provision.

Explaining his attempt at recision, Hurdle testified that he contacted the Equal Employment Opportunity Commission and relayed his story. Hurdle avers that the EEOC informed him that he did not have a viable cause of action. Hurdle has not, however, demonstrated to this Court that he contacted Sears in an effort to make Sears aware of his intent at any time during this seven day period. Following his encounter with the EEOC,

Hurdle took no further action.

As provided by the release, Hurdle received his entitlement under the severance package. Hurdle has not, to date, returned said money to Sears. Hurdle has, however, set the funds aside in a separate account. Hurdle explained by answering the following questions:

Q. Okay. Have you at any time since your discharge offered to return any of the money that Sears paid you following this -- following July of '93?

A. The money was all put in an account. It's still sitting there until this matter is resolved.

Q. Have you ever offered it back to Sears?

A. Not until I see get a forum from someone that will go ahead and let's resolve this.

Q. Is your answer "no" to that question?

A. That's correct.

A brief summary of Hurdle's contentions will aid in tying these factual allegations together. In short, Hurdle contends that he signed said release under duress. As described by Hurdle, "I

had a financial gun stuck at my head at a moment's notice." Hurdle further alleges misrepresentation inasmuch as Hurdle avers that Wickboldt assured him that said waiver would not preclude a suit based on age discrimination.

STANDARD OF REVIEW

Summary judgment is designed "to secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (citation and internal quotation omitted); *see Barry v. Armstrong Rubber Co.,* 780 F.Supp. 1097, 1099 (S.D.Miss.1991), *aff'd,* 989 F.2d 822 (5th Cir.1993), *cert. denied,* 114 S.Ct. 1067 (1994). A grant of summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party, "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of establishing

the absence of genuine issues of material fact. *Little v. Liquid Air Cor.,* 37 F.3d 1069 (5th Cir. 1994)(en banc). Once the burden of the moving party is discharged, the burden shifts to the nonmoving party to go beyond the pleadings and show that summary judgement is inappropriate. *Little,* 37 F.3d at 1071. The nonmoving party is obligated to oppose the motion either by referring to evidentiary material already in the record or by submitted additional evidentiary documents which set out specific facts indicating the existence of a genuine issue for trial. Fed.R.Civ.P. 56(e); *Fields v. South Houston,* 922 F.2d 1183, 1187 (5th Cir.1991). A mere scintilla will not defeat a motion for summary judgment; there must be sufficient evidence upon which "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986) (finding summary judgment appropriate even if "there is some metaphysical doubt as to the material fact"). If the nonmovant

satisfies its burden, summary judgment will not be granted. *Fields*, 922 F.2d at 1187.

CONCLUSIONS OF LAW

Much debate looms over whether Sears complied with the requirement set forth in the OWPA. The above colloquy demonstrates several issues of fact concerning Sears' compliance with section 626(f) and the actions of Wickboldt. Even though for purposes of this motion we must consider the release voidable,[1] the Fifth Circuit has held that voidable releases are nonetheless enforceable if ratified by the employee. *Wittor v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir.1994).

A waiver is ratified when the employee fails to tender back to the employer severance benefits received in exchange for execution of the waiver. *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir.1991). To rescind the waiver and avoid ratification, the plaintiff must meet two burdens: (1) the plaintiff

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[1]The Fifth Circuit has conclusively determined that defective waiver agreements are voidable under the OWPA and not void. *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir.1993).

has to restore the status quo ante and (2) the recision has to occur shortly after the discovery of the alleged deficiency. *Grillet,* 927 F.2d at 220. "A person who signs a release, then sues his or her employer for matters covered under the release, is obligated to return the consideration upon learning of the invalidity of the release." *Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 937 (5th Cir.), *cert. denied* --- U.S. ---, 115 S.Ct. 582, 130 L.Ed.2d 497 (1994). "When [an employee decides] to retain and not tender back to [his employer], [he] manifests [his] intention to be bound by the waivers and thus, [make] a new promise to abide by their terms." *Wamsley,* 11 F.3d at 540.[2]

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[2]This concept was further explained by the Fifth Circuit:

A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. REST.CONT. Sec. 2. That a promise has been made can be determined from conduct as well as words. REST.CONT. Sec. 19. Here the conduct giving rise to Appellants' promise to perform under their waivers was their retention of the consideration for their waivers. That appellants may have subjectively intended something different is of no moment.

> In the final analysis, the objective theory of contracts, as distinguished from the subjective theory, is based on analogy to estoppel. This is apparent whenever a person is held bound by a contract because of this manifestations when his

Hurdle contends that he was unaware of the waiver's deficiency and under the impression that he had not waived his rights under the ADEA. Moreover, Hurdle argues that the record is devoid of facts to demonstrate when and how Hurdle finally became aware of the waiver's deficiency triggering prong two of our analysis. Likewise, Hurdle argues that he is willing to return his benefits once a "forum" entertains his suit.

We note that this suit was filed in May of 1994 approximately eleven months past. for the plaintiff to successfully revoke the release, Hurdle must have sought to restore the status quo ante shortly after discovering the waiver's deficiency. At the very least, Hurdle would have had to return his severance benefits after consulting an attorney about the possibility of bringing a claim for age discrimination. *Blakeney v. Lomas Information Sys., Inc.,* 879 F.Supp. 645, 649 n.7 (N.D.Tex.), *aff'd,* 65 F.3d 482 (5th Cir.1995), *cert. denied,* 116

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manifestations are contrary to his actual state of mind.

1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS, Sec. 98, p.362 (1957)(footnote omitted).

Wamsley, 11 F.3d at 540 n.10.

S.Ct. 1042 (1996). Even if Hurdle tendered the benefits today, a tender made eleven months after the filing of the suit is untimely. *Blakeney,* 65 F.3d at 485 n.2. More importantly, Hurdle has made no such tender and chose to retain the benefit of his bargain.

Hurdle's second argument that not tendering the money received is not dispositive inasmuch as he set the money aside and is willing to return such as soon as a "forum" entertains his suit is likewise not persuasive. "Tendering a severance payment back to the employer only upon the court's endorsement of the plaintiffs' ADEA claims is not a timely revocation of the waiver." *Blakeney,* 879 F.Supp. at 649; *Williams,* 23 F.3d at 930 ("[o]ffering to tender back the consideration after obtaining relief in the lawsuit would be insufficient to avoid a finding of ratification"). Likewise, conditional offers do not satisfy the tender-back rule. *Grillet,* 927 F.2d at 221.

CONCLUSION

This court is of the opinion that the actions of the plaintiff in retaining the benefits of the severance package

ratified the otherwise allegedly defective release. This ratification created a new promise and a new obligation that is enforceable despite the waiver's statutory deficiencies. action.

Hurdle's complaint sets forth additional claims pursuant to 29 U.S.C. Sec. 623(d) (retaliation provision of the ADEA) and 29 U.S.C. Sec. 2000e-3 (retaliation provision of Title VII). Hurdle has not addressed these claims nor offered facts in support of same. Rather, Hurdle has averred that the claim asserted is one for age discrimination. Accordingly, final judgment is appropriate inasmuch as no other claims are asserted. An order dismissing this cause with prejudice shall follow.

SO ORDERED AND ADJUDGED, this the 11th day of April, 1996.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE